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Supreme Court, U.S.
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In The Supreme Court of the United States

ERIK SAMMIS, INDIVIDUALLY AND
JIMMY EVAN, INDIVIDUALLY,
Petitioners,
v.

UNSELD NANCE, SR, INDIVIDUALLY AND
AS THE NATURAL FATHER AND NEXT FRIEND OF
UNSELD NANCE, JR., ET AL.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eight Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eighth Circuit was correct in holding that a police officer may be held liable on a claim under 42 U.S.C. §1983 for failing to act to prevent another officers use of excessive force where the use of excessive force occurred within an interval of time such that a reasonable officer faced with the same circumstances would have had a realistic opportunity to intervene.

Whether when the surrounding factual circumstances are in dispute as to the disobedience of a police officers command during an alleged threat by the deceased, material questions of fact shall prevent granting summary judgment on the basis of qualified immunity.

Whether a minor party's deposed testimony that corrected his or her prior statement to state police after prolonged interrogation and detainment is sufficient to create a material question of fact when that correction is closely aligned with the medical examiner's deposition, and thereby avoid a summary judgment ruling on the defense of qualified immunity.

LIST OF PARTIES

Petitioners: Erik Sammis ("Sammis") and Jimmy Evans ("Evans").

Respondents: Unseld Nance, Sr. individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow; and Debra Farrow and Robin Perkins. Individually and as co-administrators of the Estate of DeAunta Farrow.

Defendants and Respondents below: City of West Memphis, Arkansas; Robert Paudert; and William Johnson.

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The decision of the court of appeals is reported at 586 F.3d 604. The decision of the U.S. District Court for the Eastern District of Arkansas is not officially reported but is available at 2009 U.S. Dist. LEXIS 13009.

JURISDICTION

The Eighth Circuit issued judgment on November 10, 2009. Respondent agrees that petitioners timely filed a petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Respondent denies that jurisdiction for the Eighth Circuit's consideration of interlocutory appeal of the District Court's denial of qualified immunity is pursuant to 28 U.S.C. § 1291. Respondent denies that jurisdiction before this court is invoked under 28 U.S.C. § 1254(1).

STATUTES RAISED

The Fourth Amendment to the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 U.S.C. §1983 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State,..., subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,...

Rule 56(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case arises from the fatal shooting of DeAunta Farrow and seizure of Unseld Nance by two police officers in West Memphis, Arkansas. The families of Farrow and Nance brought this action under 42 U.S.C. § 1983 and state law against the two officers, as well as the chief of police, the mayor, and the city, alleging in particular excessive force and unreasonable seizure in violation of the Fourth Amendment. The district court denied summary judgment to the officers on the basis of qualified immunity, but granted the summary judgment motions of the chief of police, the mayor, and the city.

STATEMENT OF THE CASE AND THE FACTS

A. FACTUAL BACKGROUND

On June 22, 2007, the West Memphis police department alleges to have received information after dark, that two or three black males were going to rob a particular convenience store. Seven members of the Special Response Team, including defendant officers Erik Sammis and Jimmy Evans, were allegedly ordered to conduct surveillance in the area of the convenience store. Four were stationed in a vehicle one block south of the store, another was positioned across the street from the store, and officers Sammis and Evans were located about two blocks to the north.

Officers Sammis and Evans were parked in a dark gray, unmarked pickup truck in the parking lot of an apartment complex. They were wearing camouflage pants, dark grey shirts, and black bulletproof vests. Only the backs of their vests had the word "POLICE" written on them. The fronts of the vest were unidentifiable, it was very dark and the area surrounding the apartment complex was poorly lit. At about 10:00 p.m. the officers noticed two black males, later identified as twelve-year old DeAunta Farrow and fourteen-year old Unseld Nance, walking toward the apartment complex. Farrow was on the officers' right; Nance was on their left.

The parties disagree as to what happened next. According to Nance, he and Farrow were walking to the apartment building to retrieve his cell phone. Farrow had a toy gun tucked into the waistband of his pants. The gun was gray with a black handle, and it had an orange cap at the tip of the barrel. As the two boys neared the apartment building, they saw two men get out of a dark pickup truck. The unidentifiable men pointed flashlights and guns at them and one shouted, "Get on the ground and drop the gun." Nance immediately dropped to the ground, but Farrow remained standing.

Nance says the men did not identify themselves as police, nor did they have a visible badge or patch to signify that they were law enforcement officers. The next thing he heard was a gunshot. He contends that Farrow was shot while "fixing to get on the ground" and while the toy gun was still tucked into his waistband. Nance does not recall hearing any warnings from the men before the shooting.

Officers Sammis and Evans report that as the boys approached, they saw something in Farrow's right hand that appeared to be a handgun. They got out of their truck with their guns drawn and flashlights on. Sammis claims that he shouted, "Police!" and ordered Farrow to drop his gun. Although Nance hit the ground immediately, both officers say Farrow remained standing and did not

drop his weapon despite repeated commands to do so and that he raised his right hand while still holding the gun. Sammis then fired two rounds in rapid succession. Two shots hit Farrow.

Sammis told Evans to handcuff Nance while he bent over Farrow who was lying face down on the parking lot. Sammis says he asked Farrow if he had been hit and that he responded, "Yeah. It's only a toy gun." Sammis rolled Farrow to his side and found the toy gun underneath him at waist level. Appellees contend that it was still tucked into Farrow's waistband.

Evans contacted headquarters to report the shooting and the injuries to Farrow. The other members of the surveillance team hurried to the scene, and Evans relinquished control of Nance to the other officers. Sammis and Evans contend that they had custody of Nance for no more than 10 minutes and that he was still handcuffed when they turned him over. Nance asserts that he was handcuffed for almost 30 minutes at the scene of the shooting and while being transported to the police station. Paramedics attempted to stabilize Farrow once they arrived, but their efforts were unsuccessful and he died at the scene.

An Arkansas state police officer conducted a videotaped interview of Nance less than three hours after the shooting. During the interview, Nance stated that he and Farrow had been

walking to their cousin's apartment when "two people got out of the car and pointed guns." They told Farrow and him to get on the ground and "to put the gun down." Nance reported that the two men did not identify themselves and that he had initially thought "they was people playing." Nance later stated that it had occurred to him that the men might be police officers because of how they shouted, but he repeatedly said that the men did not identify themselves and that he had not seen any police badge or patch on their clothing.

When asked about the gun, Nance demonstrated to the state police officer how Farrow had the barrel of the toy gun tucked into his waistband while they walked to the apartment building. Nance reported that Farrow had been covering the handle of the gun with his right hand and that he never removed the gun from his waistband during their walk. Nance also showed the officer how Farrow had raised his hands up after they were ordered to get on the ground. It was unclear from his oral statement and demonstration whether Nance meant that Farrow had the gun in his hand at that point or whether it remained in his waistband.

At the conclusion of the interview, the state police officer drafted a summary statement for Nance, a minor, to sign. It states in relevant part:

> DeAunta was carrying with his right hand as we walked it was under his shirt with the handle showing. We saw 2 men get out of a black pickup truck by a dumpster they had two flashlights. Then one of them said get on the ground. I got on the ground DeAunta was standing. His arms were partially raised up with the toy gun in his right hand. I was looking straight and didn't see the men. They said drop the gun. DeAunta was fixing to get on the ground when they shot.

During his deposition, however, Nance corrected his earlier statement given under police interrogation and testified that Farrow had still had the toy gun "tucked in his pants" at the time officer Sammis fired his weapon.

The medical examiner assigned to the case, Dr. Daniel Konzelman, testified that based upon the trajectory of the bullet wounds in Farrow's body, it was unlikely he had both hands raised at the time he was shot. Dr. Konzelman also stated that the trajectory indicated that Farrow's left arm was not raised but that he could not determine the position of Farrow's right arm.

B. PROCEDURAL BACKGROUND

Nance's parents filed their action in the federal district court, individually and on behalf of their son, against officers Sammis and Evans, the chief of police, the mayor, and the city. They alleged violations of the First, Fourth, and Fourteenth Amendments, as well as various state law claims. Thereafter, Farrow's parents brought their action, individually and on behalf of the estate of their deceased son, against the same defendants alleging violations of the Fourth and Fourteenth Amendments and state law. The two cases were consolidated. All defendants moved for summary judgment with the individual defendants seeking qualified immunity.

The district court analyzed the excessive force and unreasonable seizure claims against officers Sammis and Evans under the Fourth Amendment, concluding that appellees had presented sufficient evidence for a reasonable jury to determine that the officers' actions violated clearly established constitutional rights of Nance and Farrow. The court determined that the pretrial record contained genuine issues of material fact as to "whether Farrow held a toy gun in his hand that could be mistaken for a real gun and [whether he] raised it toward Sammis, or if the toy gun was 'tucked in' Farrow's pants at the time Sammis fired his weapon." The district court concluded that these questions precluded qualified immunity on

appellees' claims arising from the shooting. The officers now appeal those decisions.

The court concluded that the two officers could not however be held liable for the prolonged detention of Nance after he was turned over to others at the scene of the shooting. The court noted that, "although the continued detention of Nance appears to have been unnecessary and unwarranted, plaintiffs have failed to name any individual responsible for the detention." The court granted qualified immunity to Sammis and Evans as to the continued detention and that has not been appealed.

Finding no basis for municipal liability, the district court granted summary judgment to the city. The court also granted summary judgment to the chief of police and the mayor on the §1983 claims, concluding that appellees provided insufficient evidence to support a finding of supervisor liability. The chief of police and the mayor filed a petition to appeal if the district court's order were interpreted to permit any state law claims to survive against them, but no appeal was taken with respect to them.

The court of appeals found that significant factual disputes remain with respect to the shooting of DeAunta Farrow and seizure of Unseld Nance. The current record before the court did not conclusively establish whether the actions of

officers Sammis and Evans were objectively reasonable, therefore the Eighth Circuit affirmed the ruling of the district court denying the officers summary judgment.

ARGUMENT FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT APPELLATE COURT PROPERLY RULED THAT A POLICE OFFICER MAY BE HELD LIABLE ON A CLAIM UNDER 42 U.S.C. §1983 FOR FAILING TO ACT TO PREVENT ANOTHER OFFICERS USE OF EXCESSIVE FORCE WHERE THE USE OF EXCESSIVE FORCE OCCURRED WITHIN AN INTERVAL OF TIME SUCH THAT A REASONABLE OFFICER FACED WITH THE SAME CIRCUMSTANCES WOULD HAVE HAD A REALISTIC OPPORTUNITY TO INTERVENE.

The right to be "free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures." *Samuelson v. City of New Ulm*, 455 F.3d 871, 877 (8th Cir. 2006). There is extensive case law setting forth the requirement that an officer must have "probable cause to believe that the suspect poses a threat of serious physical harm" before using deadly force. *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005) (collecting cases that put officers on notice that they may not use deadly force under circumstances in which "they should know that the

suspect does not present an immediate threat of serious physical injury or harm"). The right of Farrow and Nance to be free from the use of deadly force was clearly established in June 2007, the time of the shooting. Existing case law would have made it sufficiently clear to a reasonable officer that a suspect cannot be apprehended by use of deadly force unless that individual poses a threat of serious physical harm. In this case, the facts are disputed and there is no basis in which the court can undeniably believe that DeAunta Farrow posed a threat of serious physical harm to either officer.

Officer Evans was also denied qualified immunity in the district and appellate court on the issue of excessive force and unreasonable seizure. The claims against Evans are based not only on the use of excessive force but also the failure to prevent its use for which there was the apparent opportunity. Respondents' district court complaints alleged that officer Evans "made no efforts to prevent the Defendant Sammis from violating the rights" of Farrow and Nance. The Eighth Circuit was long recognized that "one who is given the badge of authority of a police officer may *not ignore the duty imposed by his office*" [emphasis added] by failing to act to prevent the use of excessive force. *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981). As of June 2007, it was clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth

Amendment. *Krout* v. *Goemmer*, 2009 WL 3172180, at *5 (8th Cir. Oct. 6, 2009) (finding case law clearly established on this constitutional right as of July 2006).

2. THE EIGHTH CIRCUIT PROPERLY RULED THAT MATERIAL QUESTIONS OF FACT DO EXIST THAT PROPERLY PREVENT GRANTING SUMMARY JUDGMENT TO THE OFFICERS ON THE BASIS OF QUALIFIED IMMUNITY.

It is erroneous for the Petitioner Evans to argue that he is entitled to the defense of qualified immunity on an excessive force claim solely on the basis that he had not personally participated in the use of deadly force, which injured the plaintiff. In a similar case, the Sixth Circuit rejected an officer's argument for qualified immunity on an excessive force claim on those grounds. *Floyd* v. *City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008). As the court explained, a police officer who fails to act to prevent the use of excessive force *may still be held liable* where (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer *had both the opportunity and the means* to prevent the harm from occurring [emphasis added]. In *Floyd*, like the present case, the officer had "participated in the tactical decision that he and [his partner] would confront Floyd with their guns drawn, without any verbal warning." *Id.* at 407. The officer had failed to protect the Floyd, and the fact that he was not the

shooter did not absolve him of his responsibility. *Id.* Here, Evans confronted the boys with his gun drawn in a poorly lit parking lot at night. Neither Evans or Sammis identified themselves as law enforcement officers and Evans admits that he failed to give any warning as to the possible use of deadly force or try to stop Sammis from shooting. Evans' failure to take action to de-escalate the situation if he had an opportunity and means to do so could establish liability. *Floyd*, 518 F.3d at 406; *Ngo v. Storlie*, 495 F.3d 597, 603 (8th Cir. 2007) (holding qualified immunity inappropriate where "a warning . . . was feasible and the failure to take an extra moment to assess the situation" added to the unreasonableness of the officer's actions). Because of factual disputes by the parties and without impermissible factual determinations of exactly what occurred that evening, the neither the appellate court or this court could conclude that Evans is entitled to qualified immunity.

Further, the Eighth Circuit appellate court was correct in ruling that "qualified immunity protects government officials from liability under § 1983 when their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional

right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful. *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (8th Cir. 2006). If no reasonable factfinder could answer yes to both of these questions, the officer is entitled to qualified immunity. See *Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006)."

3. THE EIGHTH CIRCUIT APPELLATE COURT PROPERLY RULED THAT WHEN THE MINOR PARTY'S DEPOSED CHANGE IN TESTIMONY CORRECTED HIS PRIOR STATEMENT TO STATE POLICE AFTER PROLONGED INTERROGATION AND DETAINMENT, SUCH CORRECTION WAS SUFFICIENT TO CREATE A MATERIAL QUESTION OF FACT THEREBY AVOIDING A SUMMARY JUDGMENT RULING ON THE DEFENSE OF QUALIFIED IMMUNITY TO THE OFFICERS.

The appellate court's review of the district court's denial of qualified immunity de novo, was based upon having viewed the facts in the light most favorable to the nonmoving parties and drawing all reasonable inferences in their favor. *Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1019 (8th Cir. 2009). Denial of qualified immunity was affirmed because "a genuine issue of material fact exists as to whether a reasonable officer could have believed his actions to be lawful."

Craighead, 399 F.3d at 960. Respondents contend that this was a proper review.

The officers contend that instead Farrow began to raise his arms toward the officers while holding the gun in his right hand. Sammis testified that he had yelled, "Police" at the outset of the encounter and that he shouted, "No!" before firing his weapon in the direction of Farrow and Nance.

Nance, the only other living witness to the shooting, related a different set of facts creating a controverted record. He testified in his deposition that the weapon was just a toy gun, that it remained tucked in Farrow's waistband during the confrontation with the officers, and that Farrow was "fixing to get on the ground" at the time he was shot. Nance did not remember hearing officer Sammis yell, "Police" or "No!" prior to firing. In his prior interview with the state police, Nance stated that Farrow had raised his hands before he was shot. Dr. Konzelman testified in his deposition that it was unlikely that Farrow was raising both arms at the time he was shot, based upon the trajectory of the bullet wounds in his body and more consistent with Nance's latter testimony at the deposition.

When viewing the material question of fact and the controverted record in the light most favorable to the nonmoving parties, the court must presume that the officers approached Farrow and Nance without identifying themselves as police

officers, that the toy gun was tucked in Farrow's pants throughout the entire confrontation, that Sammis only said to drop the gun and get on the ground, and that Farrow may have raised his hand or hands while trying to get to the ground before Sammis shot him twice without warning. These facts taken in the light most favorable to appellees could establish the excessive use of force and unreasonable seizure in violation of Farrow and Nance's Fourth Amendment rights. *Pearson*, 129 S. Ct. at 815-16.

CONCLUSION

In conclusion, because the court of appeals determined that significant factual disputes remain with respect to the shooting of DeAunta Farrow and seizure of Unseld Nance, and that impermissible factual determinations of exactly what occurred on the evening of the shooting, they properly could not conclude at the appellate stage that Evans or Sammis are entitled to qualified immunity and because the current record did not conclusively establish whether the actions of officers Sammis and Evans were objectively reasonable, the Respondents request that the Petitioners be denied certiorari.

Respectfully submitted,

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